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IN THE

Supreme Court of the United States.

October Term, [redacted] No. [redacted] 230

1925

THE NEW YORK CENTRAL RAILROAD COMPANY and THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

v.

THE NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

Error to the Supreme Court of Pennsylvania.

Motion to Dismiss Writ of Error and Brief in Support Thereof.

THOS. RAEBURN WHITE,
700 West End Trust Building, Philadelphia, Pa.,
For Defendant-in-Error.

International, 236 Chestnut St., Philadelphia.

IN THE

Supreme Court of the United States.

October Term, 1924. No. 791.

THE NEW YORK CENTRAL RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY,

Plaintiffs-in-Error,

v.

THE NEW YORK AND PENNSYLVANIA COMPANY,

Defendant-in-Error.

MOTION TO DISMISS WRIT OF ERROR.

Comes now the defendant-in-error, by its counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above-entitled cause for want of jurisdiction.

T. R. WHITE,
For Defendant-in-Error.

BRIEF IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

Section 237 of the Judicial Code as amended (36 Stat. 1156, 38 Stat. 790, 39 Stat. 726, 42 Stat. 366, 2 U. S. Compiled Statutes, 1916, para. 1214) provides in part as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ."

We submit that the facts of this case do not bring it within the terms of this statute for two reasons:

(1) There was not drawn in question the validity of any treaty or statute of the United States, or any authority exercised under the United States, or the validity of any statute of, or authority exercised under any state.

(2) The decision of the Supreme Court of Pennsylvania was based in part upon the ground that plaintiffs-in-error were concluded as to the points they sought to raise by their failure to appeal from a former decision of the Public Service Commission of Pennsylvania.

1. THERE WAS NOT DRAWN IN QUESTION IN THIS SUIT THE VALIDITY OF ANY TREATY OR STATUTE OF THE UNITED STATES, OR ANY AUTHORITY EXERCISED UNDER THE UNITED STATES, OR THE VALIDITY OF ANY STATUTE OF, OR AUTHORITY EXERCISED UNDER ANY STATE.

The record which has been filed in this court clearly discloses the correctness of the statement above made. This case had its origin in a complaint to the Public Service Commission of Pennsylvania in a proceeding referred to in this record as Complaint Docket No. 3206. The complaint, which was filed by defendant-in-error related to a freight rate on coal moving between two points within the State of Pennsylvania. The rate was in effect on March 1, 1920, and until after September 1, 1920. The period of Federal guarantee was between these two dates.

The complaint against the rate was not only that it was unreasonably high, but that it had been unlawfully constructed. The record discloses the fact that prior to Federal control, in proceedings before the State Commission, a rate upon coal moving between the same points had been found unreasonable and ordered reduced by the Commission. Subsequently, during the period of Federal control a general increase of rates was made under General Order No. 28. In making the increase of the rate on this particular movement, one of the plaintiffs-in-error, New York Central Railroad Company, unlawfully used as the basis of the new rate the rate which had been condemned and ordered reduced by the Public Service Commission of Pennsylvania, instead of using the reduced rate, which was the lawful one. The necessary result was that the reconstructed rate was too high and out of line with other rates. (R. 7-12)

The complaint against this rate was duly proceeded with before the Public Service Commission of Pennsylvania. Plaintiffs-in-error (both being involved in the rate, as the coal moved over the railroads of both) defended, *inter alia*, upon the ground that the State Commission had no power to pass upon the reasonableness or legality of a rate in effect during the guarantee period. It was contended that if the Commission should assume to find the rate unreasonable or unlawful, this would amount to a reduction of the rate, and that the State Commission could not reduce the rate without the approval of the Interstate Commerce Commission. It was argued that the Transportation Act, 1920, so provided.

Defendant-in-error, the complainant in the original proceeding, contended in answer to this challenge of the Commission's power (1) that the correction of an unlawful rate, as prayed for in that proceeding, was not the reduction of a rate within the meaning of the Transportation Act, 1920, and (2) that the rate in controversy was upon intrastate commerce, not claimed to have any effect upon interstate commerce, and, therefore, that the Transportation Act, 1920, did not apply to it but that the State Commission had full power to deal with it.

The State Commission decided both of these issues in favor of complainant (defendant-in-error); it held that it had complete jurisdiction over the question, that the rate was unlawful and too high, and directed that it be reduced. The report of the Commission concluded by stating that reparation would be awarded upon shipments moving, *inter alia*, during the guarantee period, upon presentation of supporting data (Record in Supreme Court of Pennsylvania, pp. 9a, 18a). (R. 15-18)

Under the provisions of the Public Service Company Law of Pennsylvania, as is set forth by the Supreme Court of Pennsylvania in its opinion, the losing

party to such a proceeding before the State Commission has the right to appeal to the Superior Court of the State, and if he does not so appeal he is concluded as to all issues decided by the Commission. The plaintiffs-in-error did not appeal from the decision of the Commission above recited, and, therefore, its conclusions on the points referred to became final. (2r. 72-74)

Subsequently, defendant-in-error presented a petition to the Public Service Commission of Pennsylvania, asking for reparation on account of shipments which moved during the guarantee period and thereafter, at the rates decided to be unlawful and unreasonably high. No defense to the reparation proceeding, in so far as the same related to shipments moving after September 1, 1920, was offered by plaintiffs-in-error. As to shipments moving during the guarantee period, however (March 1, 1920, to September 1, 1920), plaintiffs-in-error claimed that the Commission had no power to award reparation for the same reasons that they had urged in the former proceeding. The Commission decided that its former decision, from which no appeal had been taken, had concluded these issues, and awarded the reparation prayed for. (2r. 15-18)

Plaintiffs-in-error paid the reparation on shipments moving after September 1, 1920, but refused to pay it on shipments moving during the guarantee period. Defendant-in-error thereupon began suit in the Court of Common Pleas of Clinton County to enforce the order of reparation, alleging the facts above recited. (2r. 4)

Plaintiffs-in-error filed an affidavit of defense in which they alleged for the third time that the Commission had no power to reduce a rate on shipments moving during the guarantee period, and that the order of reparation was void for lack of power to make it. No other defense was set up as the facts regarding the amount of coal which moved, etc., were all admitted (2r. 32)

Defendant-in-error having taken a rule for want of a sufficient affidavit of defense, the Court made the rule absolute and judgment was entered in favor of defendant-in-error. Plaintiffs-in-error thereupon appealed to the Supreme Court of Pennsylvania, and in that court again contended that the Commission was without power to reduce the rate and, therefore, that the order of reparation was void.

The Supreme Court of Pennsylvania decided (1) that plaintiffs-in-error by their failure to appeal from the first decision of the Pennsylvania State Commission were concluded as to the power of the Commission over the rate; (2) that in fact the Commission had exclusive power over the rate because it related to shipments moving exclusively between points within the State of Pennsylvania, and it was not claimed that these rates had any effect upon interstate commerce; (3) that the action of the State Commission was in fact not a reduction of the rate but the correction of an unlawful charge.

It thus clearly appears that the only Federal statute under consideration in any way was the Transportation Act, 1920. It was not decided, nor contended, that this statute was invalid in any particular, nor was there drawn in question the validity of any authority exercised under the United States. The only way in which the Transportation Act, 1920, was drawn into the case was in that plaintiffs-in-error contended that by virtue of the terms of that statute they had the right to charge a certain rate during the guarantee period, whereas defendant-in-error contended that under the terms of that statute they did not have such right where the rate had been found to be unreasonable and unlawful by the State Commission.

The issue thus raised did not draw in question the validity of the statute. It related to the proper construction, not the validity of the statute. It may be,

and perhaps is the case, that the plaintiffs-in-error claimed a right or privilege under the statute, which was denied them under the decision of the state court, but this is no ground for the issuance of a writ of error; it could only be ground for application to this court for a special certiorari.

Nor was there drawn in question in this case the validity of any statute of the State of Pennsylvania, nor any authority exercised under the State of Pennsylvania. No statute of the State of Pennsylvania was under consideration in any way, except the Public Service Company Law, which provided that in case of a decision by the Public Service Commission an appeal must be taken or the parties would be concluded as to issues decided by the Commission. It was not claimed at any stage of the case that this statute was in violation of the Federal Constitution or of any Federal statute. It was not contended that any state statute was in conflict with the Transportation Act, 1920, or any other Federal act.

There was no authority exercised by the State of Pennsylvania which was contended to be contrary to the Transportation Act, or to the Constitution of the United States, in the sense in which the word "authority" is used in the Judicial Code. That of which the plaintiffs-in-error complain is the decision of the Pennsylvania Supreme Court holding that the defendant-in-error was entitled to recover reparation. This decision did not enforce any state statute or uphold any "authority" exercised by state agencies alleged to be in violation of Federal statutes or Constitution. The decision was based in part upon an interpretation of the proceedings before the State Commission as to the issues there involved, and in part upon a construction of the Transportation Act, 1920. It held defendant-in-error entitled to receive reparation because plaintiffs-in-error had not appealed from the decision of the Pub-

lic Service Commission, holding the rate unlawful and also because in the Court's judgment they were entitled to such reparation. In this there was no Federal question entitling plaintiffs-in-error to their writ.

It is submitted that there is no ground whatever for contending that there was involved in this case any question as to the validity of any statute, either state or Federal, or any question as to the validity of any authority exercised under the state or the Federal Governments.

2. The Decision of the Supreme Court of Pennsylvania in This Case Was Based in Part Upon the Ground That Plaintiffs-in-Error Were Concluded as to the Points They Sought to Raise in the Supreme Court of Pennsylvania by Their Failure to Appeal From a Former Decision of the Public Service Commission of Pennsylvania.

It has been repeatedly decided by this court that no Federal question is involved in a case where the decision of the Supreme Court of the state has been placed upon two grounds, one of which does not involve a Federal question, and where the non-Federal ground is independent of the Federal ground and is broad enough to sustain the judgment.

Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157;
Minneapolis, etc., Rwy. Co. v. Washburn Lignite Coal Co., 254 U. S. 370;
Howat v. Kansas, 258 U. S. 181.

In the case at bar, as the statement of facts above recited clearly indicates, and as will be seen from an examination of the opinion of the Supreme Court of Pennsylvania, the decision of that Court was placed primarily upon the ground that plaintiffs-in-error had

no standing to raise again the questions which had been decided against them by the Public Service Commission of Pennsylvania, and from whose decision they did not appeal. The questions which were decided by the Public Service Commission were, as already stated (1) that the Commission had the power to deal with the rate in question regardless of any supervisory power of the Interstate Commerce Commission; (2) that the rate was unlawful and unreasonably high, and should be reduced. (Jr. 72-74)

The complaint in the Supreme Court of Pennsylvania was that the Commission had no power to reduce the rate. It is apparent without discussion that if the Commission did reduce the rate, such reduction was accomplished by its determination that the rate in effect during the guarantee period was too high, accompanied by its order that reparation would be granted for shipments moving during that period upon the presentation of supporting data. The Supreme Court of Pennsylvania so viewed it, although plaintiffs-in-error argued that it was the award of reparation upon the presentation of supporting data which reduced the rate. (Jr. 72)

It follows that by the failure of plaintiffs-in-error to appeal from the decision of the Commission, they lost their right to discuss further the Commission's power over the rate, regardless of whether the decision was right or wrong. This is what the Supreme Court of Pennsylvania decided. That it was sufficient ground upon which to rest the case is apparent. The only contention which plaintiffs-in-error made in the Supreme Court was based upon the allegation that the reduction of the rate was in violation of the Transportation Act, 1920, and the Supreme Court having decided that they were not in a position to raise that question, that was an end of the case. That the Supreme Court so considered it is clearly apparent from its opinion.

Even if it should be thought for the sake of argument that the Supreme Court of Pennsylvania was in error in holding that under the local statute plaintiffs-in-error had lost their right to appeal on the points sought to be argued in that court, still no ground is laid for suing out a writ of error; this court has repeatedly decided that on such questions the decision of the state court will be accepted as final.

Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157;
Howat, *et al.* v. Kansas, 258 U. S. 181;
Nickel v. Cole, 256 U. S. 222.

It is therefore respectfully submitted that the writ of error should be dismissed.

T. R. WHITE,
For Defendant-in-Error.

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CLERK

IN THE

Supreme Court of the United States.

October Term, 1925. No. 230.

NEW YORK CENTRAL RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

v.

NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

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October Term, 1925. No. 230.

NEW YORK CENTRAL RAILROAD COMPANY AND PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

v.

NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

STATEMENT OF THE CASE.

This case had its origin in a complaint to the Public Service Commission of Pennsylvania filed by defendant-in-error against plaintiffs-in-error, in a proceeding referred to in this record as Case 3206. The complaint related to a freight rate on coal moving between two points within the State of Pennsylvania. It was filed prior to March 1, 1920 (the date of release of Federal control), but was directed against the rate which would be in effect on and after March 1, 1920, pursuant to the terms of the Transportation Act, 1920.

The complaint against the rate (omitting those contentions which were overruled by the Commission) was that it was unreasonably high, and was discriminatory as related to other intrastate rates in the same

territory. This complaint was based not only upon the general averment that the rate was excessive but upon the fact that it had been unlawfully constructed during the period of Federal control, so as to bring it out of line with other intrastate rates which had been adjusted in previous proceedings by the Pennsylvania Public Service Commission.

The history of this rate as set forth in the report of the Commission in Case 3206 (Tr. 7) makes this clear. On December 10, 1917, the Pennsylvania Public Service Commission had reduced by 10 cents the rate on the movement of the coal in question from the mines to Lock Haven fixing it at 80 cents per ton (Tr. 8). The only change made in this rate during the period of Federal control was in pursuance of General Order No. 28 (Tr. 11) issued by the Director General providing for a general increase of rates according to a certain formula which permitted certain increases to be added to a base rate, being the rate in force at the date fixed in this order.

The representatives of the plaintiffs-in-error, then acting for and on behalf of the Director General, in applying the formula prescribed by General Order No. 28 to the rate in question, used as the basis not the rate which had been found to be legal by the Public Service Commission of Pennsylvania, as above indicated, but the illegal rate ten cents greater, which had been condemned. The result of using the illegal rate as the basis was to make the resulting rate under General Order No. 28 ten cents greater than other rates to which the formula had been correctly applied, and consequently to that extent out of line with other intrastate rates in that region (Tr. 11, Brief of Plaintiffs-in-error, 81).

Defendant-in-error had filed a complaint with the Interstate Commerce Commission complaining that

the said rate had been unlawfully constructed, but this complaint had not been acted upon at the termination of Federal control.

On June 18, 1920, the Interstate Commerce Commission held that notwithstanding the manner in which the rate had been constructed, it was not unreasonable and sustained it so far as concerns the period of Federal control ending February 29, 1920 (58 I. C. C. 124).

More than a year later, August 16, 1921, the Pennsylvania Commission filed its report (Tr. 7) holding the rate to be unreasonable to the extent of ten cents, in view of the admission that the rate had been unlawfully constructed under General Order No. 28, and thus made ten cents higher in relation to other rates in that region than it had been theretofore, and as had been fixed by the Commission in a previous order. It further found that the burden of proof was upon plaintiffs-in-error to prove the reasonableness of the advanced rate and that the plaintiffs-in-error had not discharged this burden.

The rate in effect on March 1, 1920, was $1.10 per ton for the transportation in question. This rate was increased pursuant to a general order on August 26, 1920, to $1.54 per ton. The decision of the State Commission was that the rate in effect from March 1, 1920, to August 25, 1920, should have been $1 instead of $1.10 per ton, and from August 26, 1920, to September 1, 1920, should have been $1.40 per ton instead of $1.54 per ton (Tr. 11, 12).

The Commission concluded its report by the following sentence (Tr. 12):

> "Upon the presentation of a petition, accompanied by the supporting data, reparation will be awarded for freight charges paid in excess of the rates herein determined."

A petition for rehearing was filed and refused, and thereafter the Commission made a supplemental order prescribing the division of the rate between the two carriers and directing them to make effective the new rates (Tr. 14, 15).

Under the terms of the Public Service Company Law of Pennsylvania, to be hereafter referred to, plaintiffs-in-error had the right to appeal from the decision of the Commission and upon said appeal might have raised any matter which had been determined by the Commission in its report. Although the Public Service Company Act of Pennsylvania expressly provides that in case no such appeal is taken the parties shall be concluded as to all matters determined by said report, plaintiffs-in-error took no appeal either from the order fixing rates for the future or from the determination that the rates which had been charged during the period of Federal guarantee were too high in the amounts stated.

Later on defendant-in-error filed a claim for reparation on account of excessive charges which it had paid on coal moving under the rates aforesaid, and reparation was awarded by the Public Service Commission of Pennsylvania (Tr. 15). Plaintiffs-in-error paid the reparation on shipments moving after September 1, 1920, but refused to pay it on shipments moving during the period of Federal guarantee on the ground that the award of reparation amounted to the reduction of a rate which could not be accomplished without the consent of the Interstate Commerce Commission, which had not been obtained.

Thereafter suit was begun in the case at bar in the Court of Common Pleas of Clinton County, Pennsylvania. The suit was based upon the order of reparation; the statement of claim (Tr. 4) recited the facts above specified, attached as exhibits reports of the Commission and the order of reparation, and

averred in detail the number of tons upon which the defendant-in-error had paid excessive freight charges, as to which however there was no dispute.

The plaintiffs-in-error filed affidavits of defense under the Pennsylvania practice (Tr. 22-32), in which, as set forth in the opinion of the Court, they really set up but one defense, *viz.*, the alleged illegality of the order of reparation, on the ground that it was a reduction of a rate which could not lawfully be ordered by the Public Service Commission of Pennsylvania without the consent of the Interstate Commerce Commission. The defendant-in-error took a rule for judgment for want of a sufficient affidavit of defense, alleging that this question had been decided against plaintiffs-in-error in the original proceeding, from which no appeal had been taken, and therefore that the affidavits of defense were insufficient to prevent judgment (Tr. 36-38).

The Court of Common Pleas of Clinton County duly filed its opinion (Tr. 39) in which it held the affidavits insufficient on the sole ground that all the questions raised in the affidavit of defense had been decided against plaintiffs-in-error in the original proceeding, and as no appeal from that proceeding had been taken they could no longer be relied upon. The Court declined to go into the question of the merits of the case (Tr. 46).

From this decision plaintiffs-in-error took an appeal to the Supreme Court of Pennsylvania, which affirmed the judgment primarily on the same ground relied upon by the Court below, namely, that defendant-in-error by failing to appeal from the order of the Public Service Commission in the first proceeding was concluded as to all issues raised in that proceeding, including the question as to whether the rate could be reduced without the consent of the Interstate Commerce Commission.

Motions for reargument having been made and denied, a writ of error bringing the case to this Court was allowed by the Chief Justice of the Supreme Court of Pennsylvania, and an application for a special writ of *certiorari* was filed in this Court. Defendant in error filed a motion to dismiss the writ of error and filed a brief in support thereof, and also filed a brief in opposition to the petition for a writ of *certiorari*. The Court postponed consideration of the motion to dismiss and the application for a writ of *certiorari* until the case should come up on the merits.

ARGUMENT.

I. The Writ of Error Should be Dismissed Because There Was Not Drawn in Question the Validity of Any Treaty or Statute of the United States or Any Authority Exercised Under the United States or the Validity of any Statute of or Authority Exercised Under Any State.

Section 237 of the Judicial Code as amended (36 Stat. 1156, 38 Stat. 790, 39 Stat. 726, 42 Stat. 366, 2 U. S. Compiled Statutes, 1916, para. 1214) provides in part as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a

> writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ."

We submit that the facts of this case do not bring it within the terms of this statute.

The order which is complained of, and which it is alleged violates the Transportation Act, 1920, was an order of reparation issued by the State Commission awarding damages to defendant-in-error, because it had been charged illegal and excessive rates during the period of Federal guarantee, *i. e.*, from March 1, 1920, to September 1, 1920.

Plaintiffs-in-error in their brief, page 24, put their case upon the ground that "the reparation order of the Public Service Commission was a statute of or an authority exercised under a state within the meaning of Section 237 of the Judicial Code," and they cite in support of this proposition several cases in this Court.

We deny the correctness of the principle stated. The cases cited sustain the proposition that the order of a State Commission, fixing rates, is an act of the State within the meaning of the Judicial Code, so that if it is contended that it violates the statutes or constitution of the United States it may afford the basis for a writ of error.

It is submitted, however, that a reparation order of a State Commission is not to be considered as the exercise of statutory authority, and cannot, therefore, be made the basis for a writ of error, on the ground that it violates the constitution or laws of the United States. The distinction between an order fixing rates and thus affecting the public generally and a repara-

tion order awarding damages for injuries sustained by a shipper is clearly set forth in *Baer Brothers v. Denver & Rio Grande R. R. Co.*, 233 U. S. 479. We cannot better state the distinction than in the words of the Court (p. 486):

> "That the two subjects of Reparation and Rates may be dealt with in one order is undoubtedly true. Texas & Pac. Ry. v. Abilene, 204 U. S. 426, 446. Robinson v. Balt. & Ohio R. R., 222 U. S. 506, 509. But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity, to prevent future injury to the public."

This distinction was re-asserted by this Court in *Louisville & Nashville R. R. Co. v. Sloss-Sheffield S. & I. Co.* (decided November 23, 1925), 46 Supreme Court Reporter 73, at page 79. It is well settled that an order fixing rates, being legislative or quasi-legislative in character, must be treated as an exercise of authority by the State for purposes of determining whether a writ of error to a decision enforcing said order shall be allowed. But it is equally well settled that a mere decision of a judicial or semi-judicial character is not the exercise of authority by the State, within the meaning of the judicial code.

Plaintiffs-in-error cite no authority to sustain their proposition that a reparation order is the exercise of authority by the State, in this sense, and we submit there is none. On the other hand, there are many cases which hold that the decisions of courts cannot be so treated, except under very extraordinary circumstances, not claimed to be here present.

Bethell v. Demaret, 77 U. S. 537 (10 Wall. 537);
Phila. & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162;
French v. Taylor, 199 U. S. 274, 277.

A reparation order is a mere award of damages to a private individual; it does not decide or assume to decide or establish anything whatever with regard to the public. It is not, and cannot under any theory, as we see it, be construed to be an exercise of statutory authority by a State within the meaning of the judicial code. We, therefore, submit that no basis for the writ of error has been shown and it must necessarily be dismissed.

II. The Writ of Error Should Be Dismissed and the Certiorari Refused Because the Decision of the State Court Was Placed Upon Two Grounds, One of Which Did Not Involve a Federal Question, Was Independent of the Federal Question, and Broad Enough to Sustain the Judgment.

The rule upon which we rely is stated in *Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157, 163-164, in the following language:

> "Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the Fourteenth Amendment, and another was whether the defense of estoppel *in pais* was well grounded. The first was plainly a federal question and the other as plainly non-federal. Both were resolved in favor of the canal company. The other questions, none of which

> was federal, may be put out of view in this connection. Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it."

We do not understand plaintiffs-in-error to dispute this rule, but to contend that it is inapplicable to the case before the Court. We submit that this case is a typical one in which the rule should be applied, and that the reasons to the contrary urged by plaintiffs-in-error are not well founded. We will consider these reasons separately in the further discussion of this point.

(a) *As to the Contention that the Non-Federal Ground Is So Interwoven with the Federal Ground as Not to Be an Independent Matter of Sufficient Breadth to Sustain the Judgment.*

It is argued in the brief of plaintiffs-in-error, page 33, that the decision of the Supreme Court of Pennsylvania did not rest even in part upon an independent ground, but that the Federal issue extended to the entire case.

This contention is not well founded, and it is not sustained by the cases cited by plaintiffs-in-error. The first and principal ground upon which the Supreme Court of Pennsylvania decided this case was that under the Pennsylvania statutes plaintiffs-in-error were concluded as to the issue they sought to raise there and here, by their failure to appeal from a former proceeding before the Public Service Commission. The first seven and one-half pages of the Court's opinion

(281 Pa. 260-268) deal exclusively with this question The Federal question was briefly discussed in approximately one page near the conclusion of the Court's opinion; while the Court incidentally expressed a judgment upon the Federal question it again returned to the first ground at the very end of its opinion and distinctly placed its conclusion thereon. Its conclusion may be stated in its own language (281 Pa. p. 266):

> "We are of opinion that the appellants, through their failure to appeal from the order of the Public Service Commission, on the second complaint, No. 3206, lost their right to now complain that the reduction was effected without having been submitted to the Interstate Commerce Commission for approval."

And at the very end of the opinion, 281 Pa. 269, the following:

> "As we have stated, no appeal by any party who felt aggrieved was taken from the final order as required by our acts of assembly. We are convinced that judgment for the plaintiff was properly entered by the court below, and, the assignments of error are overruled, without separate discussion."

The Public Service Company Law of Pennsylvania (Act of July 26, 1913, P. L. 1374) provides as follows, Art. VI, Section 31:

> "Whenever the Commission shall make any rule, regulation, finding, determination or order under the provisions of this act, the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled or modified in an appeal or proceeding taken as provided in this act."

We do not see how it can be successfully controverted that if the Commission in Case 3206 did reduce

the rate during the guarantee period, within the meaning of the Transportation Act, 1920, the failure to appeal therefrom necessarily concluded the right of the plaintiffs in error to again raise the question. We think it is too clear for extended discussion that a decision that the failure to appeal from the decision in Case 3206, prevented plaintiffs in error from further contesting the point decided by the Commission in that case constituted an independent ground broad enough to sustain the judgment of the Supreme Court of the State.

If this be not so, it could always be contended that a local statute requiring an appeal within a particular time would not stand in the way of afterwards reraising the Federal question although no appeal was taken; this amounts to a contention that in no case is it necessary for a litigant to follow the requirements of the local statutes regarding procedural matters, if he raises a Federal question. The decisions of this Court clearly demonstrate that this is not the law and the cases cited by plaintiffs in error do not sustain their contention. They all relate to cases in which the Federal question was necessarily decided by the Court in order to reach its conclusion. We concede that if the Court below could not have decided the case without rejecting the argument based upon the constitution or statutes of the United States, then the Federal question must be held to extend to the entire case.

But the cases cited have no bearing upon the question now before the Court, which is whether a decision by the Supreme Court of the State that a litigant had lost the right to further contest a Federal question by failing to appeal from a former judgment, is broad enough to sustain the final decision. Even a decision that a litigant is estopped to raise the Federal question has been held to rest upon an independent ground which when ruled by the Court below will deprive this

Court of jurisdiction. *Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157, 165. On this point the Court said:

> "It is not urged, nor could it well be, that as a ground of decision the estoppel is not broad enough to sustain the judgment."

This rule has been reasserted in more recent cases in this court.

Brown v. Union Pacific, 267 U. S. 255.

In *Southern Electric Co. v. Stoddard* (decided Nov. 23, 1925), 46 Supreme Ct. Rep. 71, this Court held that the judgment of the Appellate Division of the Supreme Court of New York was not reviewable on writ of error under the following circumstances. A decision had been made by the Appellate Division on a question involving the Constitution of the United States. Plaintiff-in-error could have appealed the case as of right to the Court of Appeals of New York, but did not do so; instead it requested a certificate from the Appellate Division that a question of law was involved which ought to be reviewed by the Court of Appeals, but that certificate was refused. Thereafter no application was made to the Court of Appeals. The writ of error was dismissed on the ground that the plaintiff-in-error had "failed to make proper application to the State Court of final resort."

This case is in principle similar to the case at bar. We contend here that the writ should be dismissed because plaintiffs-in-error did not pursue their remedy by appeal to the Superior Court of the State, and our contention here is fortified, as it was not in the case cited, by the judgment of the highest court of Pennsylvania, that by such failure to appeal plaintiffs-in-

error lost their right to further contest the Federal question.

In *Central Union Telephone Co. v. City of Edwardsville* (decided Nov. 23, 1925), 46 Supreme Ct. Reporter 90, plaintiff-in-error had raised certain constitutional questions in a lower court, and from the decision of the lower court had taken an appeal to the Appellate Court of Illinois, an intermediate court of appeal. The Appellate Court certified the case to the Supreme Court of the State on the ground that constitutional questions were involved which deprived it of jurisdiction. The Supreme Court remanded the case to the Appellate Court on the ground that while constitutional questions were involved in the case other questions also were involved, and an appeal having voluntarily been taken to the Appellate Court it had jurisdiction. The Appellate Court thereupon affirmed the judgment of the Court below. Plaintiff-in-error then obtained a *certiorari* from the Supreme Court of the State and removed the case to that court. The Supreme Court, however, declined to review the constitutional questions on the ground that plaintiff-in-error by voluntarily appealing to the Appellate Court, when it was entitled to appeal directly to the Supreme Court on the constitutional questions, had waived the constitutional questions. A motion was made in this court to dismiss the writ of error on the ground that the judgment of the State court had been based upon an independent ground not involving a Federal question. This Court sustained that view and dismissed the writ; contentions were made on behalf of plaintiff-in-error that this Court should determine for itself whether the Federal questions had been waived and should not hold that they had been under the circumstances of that case. This Court, however, rejected this argument

and sustained the State practice, and the decision of the Supreme Court based thereon. It was contended there, as in the case at bar, that no such decision had previously been made by the Supreme Court of Illinois, and that the decision was arbitrary. This Court, however, although conceding that the question had not previously been decided, held that

> "It is not, however, a forced or strained interpretation to hold that 'cases . . . in which the validity of a statute or construction of the Constitution is involved' include validity, under or construction of, both Constitutions. When so declared by the State court it should bind us, unless so unfair or unreasonable in its application to those asserting a Federal right as to obstruct it. This is no such case."

See also

> Live Oak Water Users' Assn. v. Railroad Commission of California (decided Jany. 4, 1926), 70 L. ed. 167.

Our opponents have cited *First National Bank v. Anderson* (decided Jany. 4, 1926), 70 L. ed. 171 (see p. 41 of brief of plaintiffs-in-error). The case is no authority for their position, but a word is required as to their discussion of the case. Plaintiffs-in-error in their brief (p. 41) italicize one of the points urged by defendant-in-error in the case cited, which was stated by this Court in its opinion as follows:

> "(b) the bank has not exercised the local statutory right of appealing from the action of the county officers in imposing the tax."

In quoting from this Court's opinion, plaintiffs-in-error stop with the sentence, "The second ground is not better," from which the inference might be drawn

that the second ground referred to is that stated in italics on the preceding page. That this is not the case is apparent from reading that part of the Court's opinion immediately following the sentence quoted by plaintiffs-in-error. The paragraph in question, of which plaintiffs-in-error quoted only the first sentence is as follows:

> "The second ground is not better. The supreme court of the state treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here. In cases coming from state courts this court's power and concern are specially directed to rulings made or refused on Federal questions. Murdock v. Memphis, 20 Wall. 590, 638, 22 L. ed. 429, 445; Bi-Metallic Invest. Co. v. State Bd., 239 U. S. 441, 444, 60 L. ed. 372, 374, 36 Sup. Ct. Rep. 141."

It is evident that what this Court meant by "the second ground" was not the point stated in the italicized portion of the Court's recital of the contentions urged, but the contention of defendant-in-error that the decree of the Court below was correct because the suit was not one in which relief could be had in equity although the Court below had held to the contrary. This Court dismissed this contention because the Court below had treated the case as one cognizable in equity, and its judgment on that point was controlling. The case is no authority for the position assumed here by plaintiffs-in-error.

We therefore submit that the Federal question was not so interwoven with the non-Federal question as to destroy its independent character. The ground of the decision on the point now under discussion was entirely independent of the Federal question and broad enough to sustain the judgment.

(b) *As to the Contention that the Decision of the State Court was so clearly Erroneous as to be Arbitrary.*

We, concede the rule, frequently announced by this Court, that if the point relied upon by the Court below was a mere device in order to escape the decision of a Federal question, and thus to deprive plaintiffs-in-error of the right to appeal to this Court, it cannot have this effect. In such case we concede that this Court will, and should, assume jurisdiction. But no such case is presented here.

In support of their contention that the decision of the State court was obviously erroneous and arbitrary, plaintiffs-in-error urge four points:

(1) That the State Court misunderstood or at least mis-stated the facts.

(2) That the State Commission did not reduce the rate in Case No. 3206, without the approval of the Interstate Commerce Commission, and, therefore, a failure to appeal therefrom could not have precluded plaintiffs-in-error on the question as to whether the rate could be reduced without the approval of the Interstate Commerce Commission.

(3) That the reduction of the rate could not be completely accomplished until a reparation order had issued, and that as no reparation order was issued in Case 3206, an appeal therefrom could not have raised the question as to the power of the Commission to reduce the rate.

(4) That the decision of the State Court that plaintiffs-in-error on their appeal to the Supreme Court of the State from the reparation order could not again raise the question as to the right of the Com-

mission to retroactively reduce the rate during the guarantee period is contrary to the former decisions of the Pennsylvania courts.

We will consider each of these contentions in order:

(1) That the State Court Misunderstood or at Least Mis-stated the Facts

Although it is alleged in the brief of plaintiffs-in-error in the head note of their argument, page 43, that the decision of the Court below discloses "several serious errors as to facts" only one alleged error is pointed out. It is said page 43: "The language of the State Court's opinion indicates that the issue which it understood to be involved in this case related to the order of the State Commission in Docket No. 3206 fixing the rate of $1.40 to be charged after August 1921." At the conclusion of their argument on this point, page 44, plaintiffs-in-error say:

> "Therefore, we submit that a decision of the State Court that the failure of the plaintiffs-in-error to appeal from the decision and order of the State Commission was a waiver of the defense asserted in this suit, is not to be accepted as final by this Court when it appears that the Court's decision was made on the theory that the defense sought to put in issue the legality of the order fixing the rate of $1.40 when such is far from the fact and when this case involves only the rate of $1.10 as to which the Commission made no order in Docket No. 3206."

In the first place it should be pointed out that plaintiffs-in-error have themselves made an inadvertent mis-statement of fact when they say that only the rate of $1.10 is involved in this proceeding. This is not the case. The reparation which was awarded was at the rate of 10c per ton (being the difference between

$1. and $1.10), from March 1, 1920, to August 25, 1920, and at the rate of 14c per ton (being the difference between $1.40 and $1.54), from August 26 to September 1, 1920. See order of the Public Service Commission, Tr, 19, and statement of the case in plaintiffs-in-error's brief, page 10-11. The case therefore related both to the $1.10 rate and the $1.40 rate.

A further answer to the contention urged is an examination of the Court's opinion as a whole rather than the brief excerpts which are quoted by plaintiffs-in-error on pages 43-44 of their brief. Plaintiffs-in-error quote a sentence from 281 Pa. 264, as indicating that the Court erroneously thought that the case before the Court was an appeal from an order fixing the rate of $1.40 to be charged for the future. That the Court had no such misunderstanding is so clear from an examination of its opinion that it is hard to understand how the contention could be made. The case before the State Court was an appeal from the decision of the Court of Common Pleas of Clinton County, enforcing a reparation order. The Court expressly points this out pages 267-268.

Further, on the very page from which the excerpt above referred to is cited (264) the Court recites that the State Commission had held "that the reasonable pay for shipments from March 1st to August 26th, should be one dollar, and for the period thereafter, $1.40."

The Court then explains that an appeal might have been taken from the decision of the Commission regarding the reasonableness of the rate and immediately afterwards follows the sentence quoted in plaintiffs-in-error's brief:

> "From the order fixing the reasonable rate no such appeal was taken, and the appellants are now debarred from complaining of the ruling."

When this sentence is read in its context it becomes clear that it had reference to the order of the Commission determining what the reasonable rate was during the periods mentioned as well as the reasonable rate for the future.

That the excerpts contained in the brief of plaintiffs-in-error are misleading when separately quoted is even more clear when the second quotation is examined (Brief of Plaintiffs-in-error, page 44). Plaintiffs-in-error have omitted that part of the quotation which would explain the sentence which they italicise and rely upon. What the Court said at 281 Pa. 267, including those sentences quoted by plaintiffs-in-error as indicating that the Court thought it was dealing only with the order of $1.40 for the future, is as follows:

> "The record shows that, after having debated the relative positions of the parties, as hereinabove indicated, and discussed the evidence, the Commission made this finding and definitive order: 'Upon all of the facts of record, we conclude that the just and reasonable through rate from the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad, for the period March 1, 1920, to August 25, 1920, both inclusive (this being the guarantee period), should be $1 per 2240 pounds, and effective August 26, 1920, the date of the 40 per cent. increase following Ex Parte 74, 58 I. C. C. 220-260, $1.40 per 2240 pounds, Respondents will be directed, by appropriate order, to establish upon one day's notice within thirty days of the service of the order the through rate of $1.40,' being the rate here complained of. This order was made without any qualification, and, as indicated, without any sug-

gestion of being subject to the Interstate Commerce Commission, and is in no sense interlocutory. It was final, and the subject of appeal. At that time this appellant was notified by the Commission that, upon the presentation of a petition, accompanied by supporting data, reparation would be awarded for freight charges paid in excess of the rates herein determined, further emphasizing the determination of the Commission that the matter was exclusively within its own control."

There can be no doubt that reference by the Court to the "rate here complained of" meant not only the $1.40 rate but the $1.00 rate, which together constituted the rate, though applicable to different periods.

This also disposes of the contention urged at various points that because the Court refers to "order" it must have meant the order fixing the rate for the future. Plaintiffs-in-error contend that what was done by the Court in Case 3206 could not be considered an "order" except as it related to a future rate. Whatever the plaintiffs-in-error may think the action of the Commission was, there is no doubt that the State Supreme Court considered it to be an order. In that portion of its opinion above quoted, it expressly refers to the finding of the Commission as to the reasonable rates during the guarantee period as "a definitive order." There is, therefore, no room for arguing that where the Supreme Court of the State referred to the order fixing the rate, it meant an order relating only to a future rate at a later date.

It is submitted that the above references to the Court's opinion show beyond any question that it made no error of fact in the matter alleged by plaintiffs-in-error.

(2) That the State Commission Did Not Reduce the Rate in Case No. 3206, and, Therefore, a Failure to Appeal Therefrom Could Not Have Precluded Plaintiffs-in-Error on the Question as to Whether the Rate Could be Reduced Without the Approval of the Interstate Commerce Commission.

It is contended that the State Commission in Case 3206 did not decide the issue raised in the affidavits of defense. The only issue so raised as set forth in the opinions of the Court of Common Pleas of Clinton County and the Supreme Court of the State, and as is conceded in the brief of plaintiffs-in-error, page 46, was that the order of reparation was void because the State Commission had no power to reduce a rate without the consent of the Interstate Commerce Commission. It is argued that this reduction was not made in Case 3206 from which plaintiffs-in-error failed to appeal, but in the later reparation proceedings.

In order to bring clearly before the Court at this point our view as to when the reduction of the rate took place, it is necessary to refer to the report and order made by the Commission in Case 3206. The report (Tr. 7) found that the just and reasonable rate for the period from March 1, 1920, to August 25, 1920, should have been $1 instead of $1.10 per ton which was charged, and that the just and reasonable rate from August 26, 1920, to September 1, 1920, should have been $1.40 instead of $1.54 per ton, which was charged. This report was concluded by the following sentence:

> "Upon the presentation of a petition, accompanied by the supporting data, reparation will be awarded for freight charges paid in excess of the rates herein determined."

It would seem without argument that this finding and determination by the Commission was the reduction of the rate, if it be conceded that finding a rate to be unlawful is a reduction within the meaning of the Transportation Act, 1920.

It is argued, however, by plaintiffs-in-error that the action of the Commission in Case 3206 was not a reduction of a rate, because it is said that the Commission made no *order* except that the carrier should publish and make effective the rate of $1.40 thereafter.

It is, of course, true that the formal order of the Commission had relation to the future, but it finally and conclusively determined retroactively the amount of the reasonable rate during the guarantee period.

We are unable to understand the emphasis placed upon this point by plaintiffs-in-error, in view of the fact that the statute which provides for an appeal from the decision of the Public Service Commission does not provide merely for an appeal from an *order* made by the Commission, but from "any rule, regulation, finding, determination or order." (See brief of plaintiffs-in-error, p. 31.) There can be no possible doubt that the decision of the Commission that the rate which had been charged during the guarantee period was unreasonable and too high was a finding or determination of the Commission, even if it should be conceded for purposes of argument that it was not an "order." The distinction which is made in the brief of plaintiffs-in-error appears to have no real substance. Our position is that the Commission made a finding or determination that the rate charged during the guarantee period was too high, and that the rate which should have been charged was a lower figure which it fixed. If there was any reduction in the rate this was the reduction, and in view of the express provisions of the statute if plaintiffs-in-error objected to this finding either because they thought the rate was not too

high or because they thought the Commission had no power to reduce it, they should have taken an appeal to the Superior Court of the State within the time provided by the statute.

Of course, the reduction of a rate after the period during which the rate was charged has expired could only be made retroactively, but we do not follow the argument of plaintiffs-in-error when they say that this reduction was not accomplished until defendant-in-error had filed a claim for reparation, had proven the amount of the shipments to it and had been awarded a sum to cover its loss. It seems to us too clear for discussion that the determination of the Commission as to what the reasonable rates should have been constituted the reduction, if reduction there was.

A further consideration which leads to the same conclusion that it was the order of the Commission in Case 3206 and not in the reparation proceedings which reduced the rate, is the difference in the nature of the orders which were made in the two proceedings.

When in the Transportation Act the reduction of a rate was forbidden without the consent of the Interstate Commerce Commission, Congress must have had in mind an order of a Commission legislative in character, effective not only upon a certain individual but upon the public at large. No other action could be reasonably argued to mean the reduction of a rate. As pointed out in *Baer Bros. v. Denver & Rio Grande R. R. Co.*, 233 U. S. 479, reparation orders and orders fixing rates are entirely different; one is quasi-judicial and the other quasi-legislative; one relates only to the injuries sustained by a particular shipper, the other relates to the public. The fact that the shipper is entitled to damages by reason of having paid excessive rates or for other reasons has no necessary relation to the damages suffered by any other shipper, and does not involve the interests of the public in any way.

It is, therefore, respectfully submitted that these considerations lead inevitably to the conclusion that it was the order of the Commission in Case 3206, fixing the rates both prospectively and retroactively, and not the mere award of reparation to defendant-in-error, which operated as a reduction of the rate in question.

But it is further argued that plaintiffs-in-error did not contend in Case 3206 that the State Commission had no power to reduce the rate without the consent of the Interstate Commerce Commission, and therefore this issue was not raised. If in fact the Commission decided the point, it matters little whether or not plaintiffs-in-error raised it; but the record plainly shows that they did raise it.

In its report the Commission said (Tr. 8-9):

"The respondents (plaintiffs-in-error) argue that in view of the decision in Northern Pacific Railway Co. v. North Dakota, 250 U. S. 135, there is no question that during the period of Federal control the rates in issue were the lawful rates; and since they were the lawful rates on February 29, 1920, they continue to be the lawful rates by virtue of Section 208 (a) of The Transportation Act, and that the provisions of the Pennsylvania Public Service Company Law do not render them illegal.

"The Transportation Act of 1920, Section 208 (a), establishes the intrastate rates as well as the interstate rates to be effective upon the termination of Federal control, but the sovereign power of the State to regulate intrastate rates is clearly recognized in that it provides that such rates 'shall continue in force and effect until thereafter changed by State . . . authority.' Congress enacted the (fol. 15) laws which made possible the assumption of control and the operation of the railroads of the country and logically must pro-

vide the legislation for the return of those properties to their owners.

"Federal control endured for over two years. So long a period even under normal conditions could not be without changes in rates. As few, if any, rates remained unchanged, it was imperative that the legislation returning the carriers to their pre-war operating status should establish a rate status. We are also of the opinion that the rates thus established became subject to The Public Service Company Law immediately when the railroads were restored to their owners."

In its subsequent report on the question of reparation, the State Commission used the following language (Tr. 16):

"They (plaintiffs-in-error) do, however, contest both the validity of the Commission's decision in case No. 3206 and its power to award reparation in the present case with respect to shipments moving between March 1, 1920, and August 31, 1920, and these are the issues to be considered in this brief. . . . It is the defendants' position, first, that since the rates attacked were in effect on February 29, 1920, they continued to be lawful rates for this transportation and that the decision of this Commission in case No. 3206, in so far as it purported to effect a reduction in the rates of the defendants for transportation between March 1, 1920, and September 1, 1920, was void because not approved by the Interstate Commerce Commission and could, therefore, give the complainant no right to reparation; and, Second, that an order in this case requiring the defendants to pay reparation on such shipments would, in effect, be an order reducing the rates charged and, without the approval of the Interstate Commerce Commission, would be of no effect under the section of the Transportation Act above quoted.

"The first of these objections that the rates in effect on March 1, 1920, and during the six months

following were lawful rates was advanced by respondent in the original proceeding (P. U. R. 1921 E, p. 80, *supra*), wherein we determined the reasonable rates. There is no question but that the rates were the lawful rates in the sense that they were 'a collectible rate, or one that may be sued for.' Suburban Water Company v. Borough of Oakmont, 268 Pa. 243. The position that the rates in effect on March 1, 1920, were not reviewable by this Commission on complaint is without support in law."

It will be noted that plaintiffs-in-error contended "that the decision of this Commission in 3206 *in so far as it purported to effect a reduction in the rates of the defendants for transportation between March 1, 1920, and September 1, 1920,* was void because not approved by the Interstate Commerce Commission." (Italics ours.)

It is thus clear that plaintiffs-in-error did contend that the Commission in Case 3206 had reduced the rate, and further contended that such reduction was void because it had not been approved by the Interstate Commerce Commission. On this point the State Commission further said (Tr. 18):

"As to the contention that the rate determined by this Commission effects a reduction in a rate prior to September 1 1920, and that the approval therof by the Interstate Commerce Commission has not been had, it must be borne in mind that our report and order were issued on August 16, 1921, which made it impossible to secure prior approval and that the Interstate Commerce Commission (March 13, 1922) concluded that it is without jurisdiction to pass upon claims for reparation arising from intrastate movements during the guaranty period."

When suit was begun on the reparation order in the Court of Common Pleas of Clinton County plain-

tiffs in error filed affidavits of defense which are iden tical in form and raise the question of the power o the Public Service Commission to make the repara tion order. In these affidavits of defense is containe the following averment (Tr. 23 24):

> "This defendant avers that, while the Publi Service Commission purported to find that th just and reasonable rate for the through move ment of coal from the mines in the Munson an Hawk Run Districts to Lock Haven, Pennsylvania for the period from March 1, 1920, to August 2 1920, was $1.00 per ton, and from August 26, 192 to September 1, 1920, was $1.40 per ton, neverthe less the commission's finding as to a just and rea sonable rate during the period from March 1, 192 to September 1, 1920, was nugatory and of n avail, and the said finding is of no effect and i violation of Section 208 (a) of the Transportatio Act, 1920. This defendant further avers tha while the finding, as stated above, was made b the Public Service Commission in the reports re ferred to, it entered no order at that time wit respect to the matter, and thereafter issued n order save and excepting the order of reparatio which is the subject of this suit, and which i shown in the Plaintiff's Statement of Claim, con stituting pages 26 and 27 thereof, and designate 'Exhibit G.'"

This averment clearly alleges that the finding o the Commission in Case 3206 was void because it wa in violation of the Transportation Act, 1920. It wil be noted that it does not allege that the findin of the Commission in Case 3206 was merely ineffectiv because not as yet approved by the Interstate Com merce Commission, as now contended, but that it wa absolutely void, thus clearly sustaining the statement by the Commission in its reports and by the Stat Court in its opinion that the question as to the powe

of the Commission to make the order was challenged at that time and decided by the Commission contrary to the arguments submitted by plaintiffs-in-error.

As to the issues raised in Case 3206, the Supreme Court said (281 Pa. 264-266; Tr. 91-92):

> "It is important to remember that, in the proceeding before the state board on the second complaint (3206), which passed upon the disputed charges fixed during federal control, the appellants here asserted that the Public Service Commission had no power to reduce the rates between March 1, 1920, and September 1, 1920, and any attempt to do so would be void because not approved or authorized by the Interstate Commerce Commission. At the hearing then, the railroads denied to the former any power or authority whatsoever to hear and determine the case by way of a reduction, and claimed such order was 'nugatory and of no avail.' The issue was there squarely joined as to whether the commission had power within itself to hear and determine the reasonableness of a rate during the guarantee period, without the joinder of the Interstate Commerce Commission. We take from the record before us that appellants denied any authority to alter the charges in any manner until the federal tribunal had acted or authorized it to be done. . . . Had the question of the exclusive right of the Public Service Commission to deal with the rates involved not been raised, a different proposition might be before us. But that the contrary was considered and decided in complaint No. 3206, and squarely passed upon by the commission, is evidenced not only from the record in that proceeding, but from the opinion in the reparation proceedings now before the court. It was only after our decision in L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493, that a change of attitude by the defendants took place."

This is all that the record shows on this subject. Plaintiffs-in-error rely on their unsupported assertion,

not sustained by their own affidavits filed of record, that they did not challenge the power of the Commission to deal with the rate; but the record is against them. Irrespective of this, however, the question was decided, and it was their duty to appeal if they were not satisfied with the decision.

It is very clear that after the State Commission issued its order on August 16, 1921, in Case 3206 no consent of the Interstate Commerce Commission could have been had, even if it had been sought, on intrastate rates in effect during the guarantee period more than a year previous, in view of the ruling above referred to. It was, of course, known at that time that the Interstate Commerce Commission had in fact approved the rates which the State Commission had condemned for the period ending February 29, 1920, but no consent had been sought or obtained as regards the reduction of rates thereafter. Plaintiffs-in-error had argued that the Commission had no power to reduce the rate without the approval of the Interstate Commerce Commission and that an order of reduction if made would be void.

Under these circumstances, if plaintiffs-in-error desired to contest the Commission's ruling and determination that it had jurisdiction to reduce the rates during the guarantee period, and further to contest its conclusion that such rates should be and were thereupon retroactively reduced regardless of any action by the Interstate Commerce Commission, it was the duty of the plaintiffs-in-error to take an appeal to the Superior Court of the State as the statute provides. On that appeal all questions which had been investigated and determined by the Commission in Case 3206 would have been reviewed by the Superior Court. This would have included the question whether the State Commission had the power to reduce the rate

during the guarantee period without the approval of the Interstate Commerce Commission.

The theory of the Public Service Company Law of Pennsylvania is that all questions which have to do with the reasonableness of a rate under discussion shall be finally settled and ended at the first hearing before the Commission. It is this hearing which fixes and determines the rights of the public, including the complaining shippers and any others who may be interested.

If any shipper desires reparation he files a separate and later proceeding in which he avers and proves his damage. The carrier may deny the damage but he may not again raise any question as to the reasonableness of the rate.

A consideration of the statutes and the practice prevailing in Pennsylvania, clearly shows that no issues can be raised in the reparation proceeding except issues of fact as to the amount of the shipments which moved under the excessive tariffs, and sometimes the question whether the freight has actually been paid by the complainant and the loss not passed on to others. It was never the intention that the issues which had been settled and determined in the first proceeding should be threshed over again in the second proceeding. This is fully demonstrated by cases from the courts of Pennsylvania to be cited in the next section.

It necessarily follows that the reduction of the rate was made at the first proceeding in Case 3206 and not in the reparation proceedings thereafter.

The contentions that the State Commission did not reduce the rate in Case 3206, and, that failure to appeal therefrom could not have precluded the plaintiffs-in-error from raising the point in further litigation are not sustained.

(3) That the Reduction of the Rate could not be Completely Accomplished until a Reparation Order had Issued, and that as no Reparation Order was Issued in Case 3206, an Appeal Therefrom could not have Raised the Question as to the Power of the Commission to Reduce the Rate.

It is argued in the brief of plaintiffs-in-error (p. 50, *et seq.*) that the issue as to the power of the State Commission to reduce a rate during the guarantee period *could not* have been raised upon an appeal from the decision of the State Commission in Case 3206.

This, of course, is based mainly on the contention already discussed that the action of the Commission in that proceeding was not a reduction of the rate, although this argument is clearly contrary to the position which the plaintiffs-in-error assumed in the case itself. It is further argued in the brief, however, page 51, that an appeal from the decision of the Commission in Case 3206 would have been deemed premature if taken prior to the issuance of a reparation order, on the theory that at any time prior to the issuance of such order the approval of the Interstate Commerce Commission to the reduction might have been secured. It is argued that the rate was not completely reduced by the order of the Commission in Case 3206, but only reduced subject to the approval of the Interstate Commerce Commission.

This argument, however, is not based on facts. At the time when the decision of the Commission in Case 3206 was made, in August, 1921, the guarantee period had long since expired; the Interstate Commerce Commission had announced its refusal to assume jurisdiction of any applications for approval or disapproval of reparation orders, and obviously no such approval

could then be secured. This is entirely aside from the fact already set forth that the power of the State Commission was challenged to deal with the rate at all, and that it announced and exercised its full control over the rate on the ground that it was one which related to purely intrastate commerce, with which the Interstate Commerce Commission had nothing to do. Whether this decision was right or wrong, it was a final decision, and if plaintiffs-in-error had taken an appeal at that time, they could have corrected any errors made by the Commission in so holding. In such case if the Supreme Court of the State had refused them relief, they would undoubtedly have had an appeal to this court. It is because they did not follow that procedure that they lost their remedy.

It is stated and argued at several points in the brief of plaintiffs-in-error that they did not object to the order issued by the Commission in Case 3206, so far as it related to the future, and they emphasize that as the Commission's order related only to the future there was nothing from which to appeal. This view of the case, however, ignores obvious facts. The Commission found and determined that the rate during the guarantee period was unreasonable and that a lower rate should have been charged. There was nothing to prevent the plaintiffs-in-error from appealing to the State Court, alleging error in the Commission's ruling in holding that the rate should be reduced during the guarantee period, but not objecting to its ruling as applied to the future. On such an appeal they could, of course, have raised every point they now seek to raise, including the lack of power of the Commission to reduce the rate. To hold that plaintiffs-in-error could ignore their right of appeal and thereafter raise the identical issue in subsequent litigation, notwithstanding the plain provisions of the Pennsylvania statute to

the contrary, would be to hold that a litigant is never required to follow the procedure prescribed by State statutes, if he has or claims to have a Federal issue upon which he relies.

(4) That the Decision of the State Court That Plaintiffs-in-Error on Their Appeal From the Reparation Order Could Not Again Raise the Question as to the Right of the Commission to Retroactively Reduce the Rate During the Guarantee Period is Contrary to the Former Decisions of the Pennsylvania Courts.

It is argued in the brief of plaintiffs-in-error (p. 52, *et seq.*) that the decision of the Supreme Court of Pennsylvania in the case at bar, holding that the issue as to the power of the Commission to reduce the rate should have been raised by an appeal from the original proceeding in Case 3206, is contrary to the former decisions of that Court.

This contention is wholly without basis. An examination of the cases which are cited in support of the proposition advanced by the plaintiffs-in-error shows that everyone of them was decided contrary to the argument which is made.

The first case cited by plaintiffs-in-error (p. 53) is *Newport & Shermans Valley R. R. Co. v. Public Service Commission*, 75 Pa. Superior Court 28. It is stated that the Court held in the case cited that "an appeal would not lie to review a decision of the State Commission that rates collected in the past had been unreasonable and that the plaintiff was entitled to reparation."

This statement as to what was decided in the case cited is misleading. The appeal was not from a decision of the State Commission that rates collected had been unreasonable but from an order of the Commission awarding reparation, the decision as to the rea-

sonableness of the rate having been made in a former proceeding. The statute plainly provides, as the opinion in that case states, that there can be no appeal from an order of reparation, but that the carrier if it wishes to contest the order may simply refuse to pay and in that event the plaintiff must proceed by suit in the courts. In such a case the carrier can defend on the ground that the shipments had not moved as claimed, or that the plaintiff had not suffered loss by reason of such payments, but it cannot in such proceeding again raise the questions which were decided in the former proceeding, and this, of course, includes all questions as to the reasonableness of the rates.

In the case cited the appeal was quashed because the statute prohibited such an appeal, and that is all there is in the case. While it is not so stated in the brief of plaintiffs-in-error, it would seem as if the inference is sought to be drawn that whereas in the case at bar the Supreme Court of Pennsylvania held that an appeal should have been taken from the decision of the Commission, that in the case cited it was held to the contrary, that an appeal could not be taken. What has already been said clearly shows that the cases are wholly different. Under the statutes in force in Pennsylvania an appeal does lie from a proceeding to determine the reasonableness of rates, but an appeal does not lie from an order of reparation. The case cited in the Superior Court was of the latter character, whereas the ruling in the State Court in the case at bar referred to an appeal of the former character.

The second case cited by plaintiffs-in-error on this point (p. 54 of their brief) is *New York & Pennsylvania Co. v. New York Central R. R. Co.*, 267 Pa. 64. This case does not support in the least the arguments which are advanced here by plaintiffs-in-error; on the contrary it fully sustains the position assumed by the defendant-in-error.

The case cited was an appeal by the carrier from a decision in the Court below enforcing an order of reparation. In the suit on the reparation order, and again in the Supreme Court of the State, the carrier attempted to raise again the questions which had been determined in the first proceeding before the Public Service Commission, holding certain rates to be unreasonable. In that case, as in the case at bar, the Supreme Court clearly held that this could not be done; that it was the duty of the carrier, if he contested the decision of the Commission as to the reasonableness of the rate, to take an appeal from this finding or determination; after there had been a final decision as to the reasonableness of the rate, the reparation proceedings might follow but upon such reparation proceedings questions as to the reasonableness of the rate could not be again raised.

That the decision of the Supreme Court in the case cited was in all respects in accord with its decision in the case at bar is clearly apparent from the following excerpt from its opinion, pages 69-71:

> "At the hearing by the commission, defendant raised three objections to the complaints: (1) That they were not in proper form. This was overruled. (2) That, since the complaints were regarding a joint rate, though 'made up of two separately established locals or proportionals,' the Pennsylvania Railroad Company should also have been made a party to the proceedings. Upon this point the commission said: 'The (local) portion of this through rate imposed by the Pennsylvania is not questioned by either the complainants or the respondents'; and again: 'It is practically conceded by both respondent and complainant that the Pennsylvania local rate is reasonable. . . . To compel the Pennsylvania Railroad Company to appear would be of no particular purpose. . . . Whenever a through rate is adjudged unreasonable, and it is made up of separately imposed pro-

portionals or locals, it may be reduced to a reasonable rate by an order directed against the proportional or local found to be unjust or unreasonable,' citing Interior Iowa Cities Case, 28 I. C. C. 64. It therefore decided 'The through rates complained against . . . are for the reasons above stated held to be unjust and unreasonable, . . . (and hence) an order will be issued directing the respondent to strike from its tariff the increased locals or proportionals which are the subject of this complaint, . . . and to restore the rates of respondent in effect immediately prior thereto.' A rehearing asked for by defendant was refused, an order made in accordance with this ruling, and from it defendant did not appeal. No order of reparation was then made because the machinery of the law, so far as it relates to this branch of the investigation, looks only to an inquiry into the reasonableness of the rates objected to, and hence, as will hereinafter be pointed out, the statute requires reparation to be applied for, and granted or refused in a later proceeding.

Defendant not having refunded to plaintiff the amount paid in excess of the reasonable rate as thus determined, plaintiff filed with the commission a petition setting forth the foregoing facts and the damages it had suffered, and asked for an order of reparation. Defendant attempted to reraise the question decided in the first proceeding, but this it could not then or thereafter do, not because the facts and law there laid down were *res adjudicata* in the usual acceptation of that term, but because, by article VI, section 31, of the act, defendant's failure to appeal made all those rulings 'conclusive upon all parties affected thereby.' Hence, as between these parties, it was conclusively determined the complaints were in form sufficient to comply with the statute, the Pennsylvania Railroad Company was not a necessary party to the proceedings, and defendant's proposed new rates were unreasonable. Had an appeal been taken, most of the matters now complained of would have been considered and

> determined by the Superior Court, for section 24 of the same article requires it then to decide whether or not 'the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in conformity with law.' "

The third case cited in the brief of plaintiffs-in-error (p. 54) in support of their contention that the decision in the case at bar is out of harmony with former cases in Pennsylvania is *Lehigh & New England R. R. Co. v. Public Service Commission*, 79 Pa. Superior Ct. 540; 277 Pa. 493. In that case the rate under consideration was an intrastate rate, but it was contended that a reduction of the same would constitute unjust discrimination against interstate commerce on the line of the carrier (79 Pa. Superior Ct. 547). The Superior Court held, in accordance with this contention, that the rate was such a one as would affect interstate commerce, and, therefore, that it was subject to the joint jurisdiction during the guarantee period of the State and Interstate Commerce Commissions. The Supreme Court, accepting this finding as final, dealt only with certain questions, upon which an appeal was allowed from the Superior Court. It appeared that the Interstate Commerce Commission upon hearings duly had before it, had reduced a rate from 40 cents to 25 cents a ton, and that thereafter the State Commission on a similar complaint made the same reduction, enforcing during the guarantee period after March 1, 1920, the same rate as had been fixed by the Interstate Commerce Commission as aforesaid. The carrier appealed to the Superior Court from the decision of the State Commission reducing the rate. The action of the State Commission was treated throughout, and was repeatedly referred to in the opinion of the Court, as the reduction of a rate. The

Supreme Court used the following language with regard to the scope of the appeal from the order determining the reasonable rate (p. 499).

> "The appeal to the Superior Court opened all challenged findings relating to the contested rate; the final decree was not the only matter to consider. There were included not only the basis for the rate from December 17th onward, but retroactively the basis for the finding that, from December 17, 1921, back to March 1, 1920, the rate was unjust if the commission so found it. Questions on the findings are not to be taken up piecemeal,—that is for the future under this appeal, and the reasonableness of the past rate on an appeal from a reparation award, though in the latter the commission may limit recovery to any damage actually sustained. See Mr. Justice SIMPSON's opinion in N. Y. & Pa. Co. v. N. Y. C. R. R. Co., 267 Pa. 64. The Superior Court did not err in considering all questions presented to the commission or arising under the complaint."

It is respectfully submitted that the language above quoted could not more plainly sustain the position assumed here by the defendant-in-error. It is clearly stated that on appeal from the decision of the State Commission the questions are not to be taken up piecemeal, but that "the reasonableness of the past rate," as well as the rates for the future, are to be opened and considered. This ruling is a direct decision to the effect that in the case at bar the legality of the State Commission's decision determining the unreasonableness of the past rate should be considered upon an appeal from the Commission's decision thereon, and not thereafter in connection with a suit on a reparation award.

It is argued in the brief of plaintiffs-in-error, page 55, that the Court held that "the appeal in the case cited was premature to raise the objection sought to

be interposed to the granting of reparation, and that the parties should await the issuance of a reparation order, and should test the validity of that order by a suit for its enforcement."

Undoubtedly the Court did say that upon an appeal from an initial hearing before the Commission, questions as to the right of reparation could not be raised, and there is no doubt about this, and never has been. The first proceeding is not intended to determine the right to reparation nor the amount thereof. It does, however, determine all questions as to the reasonableness of the rates or the reduction thereof, and these questions cannot be again raised in reparation proceedings. The language in the opinion of the Superior Court of Pennsylvania italicized by plaintiffs-in-error (brief, p. 56) we submit has no application whatever to the case at bar; on the contrary the case itself, as is shown by the quotation from the Court's opinion above given, sustains the position assumed by defendant-in-error in all particulars.

Incidentally it is interesting to note that the Supreme Court of Pennsylvania expressly referred to the action of the State Commission, in retroactively fixing the reasonableness of the rates during the guarantee period, as a reduction of the rate (p. 502).

This is what we contend in this case. The action of the Commission in Case 3206, in retroactively fixing the reasonableness of the rate during the guarantee period, was a reduction of that rate, and if plaintiffs-in-error objected to such reduction, they had their remedy by appeal, which they failed to follow.

It is, therefore, respectfully submitted that the effort of plaintiffs-in-error to prove that the decision of the State Supreme Court in the case at bar was out of line with its former decisions is not only shown to be unfounded, but that the contrary has been demonstrated beyond possibility of question.

A final point is made in the brief of plaintiffs-in-error (pp. 58-59) that the effect of the decision of the Court below is to hold that a reparation order is conclusive proof of the facts stated therein. It is said that "the Court below has held in effect that if carriers fail to appeal from a decision of the State Commission that reparation will later be awarded, the State Commission's decision becomes conclusive and the reparation order subsequently issued is not open to attack."

This statement is entirely unwarranted by anything in the Court's opinion. It has not been so held. It has been held that the failure to appeal from the first proceeding before the Commission concludes the parties as to all matters decided in that proceeding, but it has never been held that the carrier could not make a defense to reparation proceedings, or to a suit upon a reparation order on any ground except those decided by the Commission in the first proceeding, such as, for example, that the shipments claimed had not actually moved, or that the plaintiff had not in fact suffered damage by the payment of the excessive charges.

It is, therefore, submitted that the plaintiffs-in-error have entirely failed in their contention that the decision of the State court was so clearly erroneous as to be arbitrary. To succeed, they must of course convince this Court that the decision of the State Court was not only clearly wrong but that it had no reasonable basis. There can be no successful claim of this under the facts here present. The rule should therefore be applied that a writ of error does not lie where the State court has placed the decision of the case upon a ground independent of the Federal question, which independent ground is broad enough to sustain the judgment, and the writ of error should be dismissed.

As it is well settled that a petition for a writ of *certiorari* will be denied where the judgment of the Court below has been placed in part on an independent

ground which is broad enough to sustain the judgment, Nichol v. Cole, 256 U. S. 222, we submit for the reasons above discussed that the petition for a writ of *certiorari* should be denied.

III. The Transportation Act, 1920, Does Not Provide That a Reduction of Purely Intrastate Rates, Which Do Not Affect Interstate Commerce, Must Be Approved by the Interstate Commerce Commission.

Section 208 (a) of the Transportation Act, 1920, reads as follows:

> "208. (a) All rates, fares and charges, and all classifications, regulations and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission."

It will be observed that the act applies *inter alia*, to rates which, on the termination of Federal control, were "in effect on the lines of carriers subject to the Interstate Commerce Act." The question, therefore, arises as to what rates were intended; whether all rates, interstate and intrastate, or whether the act was intended to apply to interstate rates and to intrastate rates only in so far as they affect interstate commerce.

It is respectfully submitted that the latter construction is the correct one; there is no claim here that

the rates under discussion on coal moving entirely within the State of Pennsylvania have any effect upon interstate commerce or interstate rates, therefore the case is not one where the approval of the Interstate Commerce Commission was required.

We base our position primarily upon the terms of the act. Our argument can be best understood by examining the statute in its complete form as reported in United States Statutes at Large, Volume 41, part 1, page 456, etc.

The point we make is that Congress, when dealing with carriers in most of the sections of the Act under titles I, II and III refers to them as carriers under Federal control or simply as carriers without limitation, but in three instances, including Section 208 (a), it carefully limits the carriers affected by the section to those which are "subject to the Interstate Commerce Act." It is our contention that this indicates an intention by Congress to limit the application, *inter alia,* of Section 208 (a) to rates, and fares charged in interstate commerce or in intrastate commerce when and only when such rates and charges affect interstate commerce.

Thus Section 200 (a), 41 U. S. Stat. at Large, 457, provides that at a certain date fixed the President shall relinquish control "of all railroads and systems of transportation then under Federal control." Section 204, page 460, relates to reimbursement for deficiencies incurred during Federal control; "carrier," as used in this section, is defined to mean any railroad "engaged as a common carrier in general transportation." Section 206 (a), page 461, provides a method whereby causes of action may be prosecuted arising out of the operation of any such carrier. Paragraph (c) of this same section, page 462, provides for the filing of complaints for reparation on account of damage claimed to have been caused by reason of the col-

lection or enforcement of illegal fares, etc., "including those applicable to . . . intrastate traffic," making it clear, if it were not otherwise evident, that the Act was intended in these sections to apply to intrastate commerce and traffic. Section 207, relating to the refunding of the carrier's indebtedness to the United States, and Section 209, relating to the guarantee of the income of carriers after the termination of Federal control, are similarly unlimited in application. They apply to intrastate as well as interstate carriers.

In Sections 208, 210 and 300, however, very different language is used. Section 208 (a), page 464, has been quoted above. Its application is limited to rates, fares and charges, etc., which "on February 29, 1920 are in effect on the lines of carriers subject to the Interstate Commerce Act." In Section 208 (b) there is the same limitation of the carriers affected; the paragraph relates to divisions of joint rates, fares, charges, etc. Section 210 relates to new loans to railroads during the transition period following the termination of Federal control. This section also is limited in its application to "carriers by railroad subject to the Interstate Commerce Act." Title 3, entitled "Disputes between carriers and their employees and subordinate officials," relates to the Railroad Labor Adjustment Board and certain other matters. Section 300 under this title defines "carrier" as used in said title to mean "any carrier by railroad subject to the Interstate Commerce Act" with certain exceptions.

Our contention is that Congress when dealing with rates to be charged and with loans to be made after the termination of Federal control and when dealing with the settlement of disputes between carriers and their employees intended to limit the application of the statute to carriers engaged in interstate commerce or in intrastate commerce to the extent that it affected

or interfered with interstate commerce and to rates, fares, charges, etc., applicable to such commerce.

If this is not the case then it may well be asked why did Congress introduce a limitation where there was none before. If it meant to include all rates in effect on the lines of all carriers subject to Federal control, why did it not say so? There can be but one answer to this question.

The expression used in the three sections last above referred to is "carriers subject to the Interstate Commerce Act." An expression identical in meaning is used all through Title 4 of the same act, 41 U. S. Stat. at Large, p. 474. This title is called "Amendments to Interstate Commerce Act" and all through it constantly occurs and recurs the expression "carriers subject to this Act." The word "carriers" in Section 400, page 474, is carefully defined to mean carriers engaged in interstate transportation and it is specifically provided that it shall not apply "to the transportation of passengers or property . . .wholly within one state." In short, Title 4, passed as a part of the same enactment as the section under consideration, is clearly limited in its application to interstate commerce and to intrastate commerce so far as it may affect interstate commerce and all through this title, as we have said, the expression "carriers by railroad subject to this Act" is used. The expression used in Sections 208, 210 and 300 of the act, is "carriers subject to the Interstate Commerce Act." This difference of phraseology was adopted obviously because the earlier part of the Transportation Act, was not a part of the Interstate Commerce Act, whereas Title 4 was. With this explanation the two expressions are identical in meaning and, on the face of it, it would seem incontrovertible that they mean the same thing, especially as they are used in the same statute.

It necessarily follows that the rates, fares and charges, which in Section 208 (a) are made subject in certain particulars to action of the Interstate Commerce Commission, include only fares and rates which are charged in interstate commerce or in intrastate commerce to the extent that such fares and rates may prove discriminatory as related to interstate rates or may otherwise affect the same.

In spite of this apparently clear meaning of Section 208 (a), however, plaintiffs-in-error argue that by reason of certain phraseology contained in it, it must be construed to apply to purely intrastate rates.

The first point made, brief of plaintiffs-in-error, page 69, is that the section provides that the rates shall continue until changed by Federal or State authority. It is said that a State authority could not in any event change an interstate rate and, therefore, the use of this expression was meaningless, unless it was intended that the Act should apply to intrastate rates.

This argument will not bear examination. There is no doubt that the Interstate Commerce Commission has authority over intrastate rates, fares and charges in so far as they may be interwoven with interstate rates so as to affect the interstate rate structure. In such cases the State authority would certainly act in the first instance with regard to the intrastate rate, and if no objection were made by the carrier or others, this action would be final. If, however, it were contended that the State rates were interwoven with the interstate rates, then a case would be presented for application to the Interstate Commerce Commission; but the State authority would act in the first instance, and this explains the use of the expression "until thereafter changed by Federal or State authority" which is made the basis of the argument.

It is further alleged in the brief of plaintiffs-in-error, page 69, that the expression "all rates, fares

and charges'' is an indication that *all* rates are being included, not merely those charged in interstate commerce or in intrastate commerce which affects interstate commerce.

But the expression ''all rates, fares and charges'' is subject to the limitation immediately following; that is, to those ''which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act.'' We, therefore, must return to the first point raised as to the meaning of these words, and in view of the precise similarity of expression used here and in Title 4 of the act which admittedly relates only to interstate commerce, there seems no room for doubt that it was meant to limit the application of the act to such rates, fares and charges as relate to interstate commerce or intrastate commerce under the circumstances mentioned above, but that it was not intended to apply to commerce purely intrastate and not affecting interstate commerce.

It is argued that it must have been the intention of Congress to maintain both State and interstate rates at the high level at which they were found on March 1, 1920. This does not follow. It was undoubtedly the intention of Congress to continue the rates, fares and charges specified in Section 208 (a) at said high level and to prevent them from being reduced except with the approval of the Interstate Commerce Commission, but an argument that Congress must have meant to include *all* rates because it had guaranteed the income of the railroads, is not convincing; Congress may have believed, and undoubtedly did believe, that the maintenance of the rate structure of the country, in so far as it related to interstate rates and intrastate rates where they affected interstate rates, was sufficient to yield revenue adequate for the needs of the railroads; and it doubtless thought, and rightly, that it would be

unwise for Federal control over State rates to be continued after Federal control had ended.

The quotation from the Congressional Record cited by plaintiffs-in-error, pages 72 and 73 of their brief, is not convincing. Remarks made by members of the House or Senate can never override the plain meaning of the statute, but in this case the language referred to does not sustain the position of the plaintiffs-in-error. The brief cites, page 73, a remark by a member in charge of the bill that the State rates would be continued "until the proper State authorities can pass upon them, otherwise they would go back to pre-war rates."

This is a clear statement by this member that, in his opinion, the State authorities could reduce State rates, yet the argument made here by the plaintiffs-in-error is that the State authorities cannot reduce the State rates, but that such reduction can only be made with the approval of the Interstate Commerce Commission.

The omission of the proposed amendment quoted in the brief, page 73, is not significant. If it had been inserted it might have been construed to prevent the Interstate Commerce Commission from exercising control over intrastate rates in any case, even where they affected interstate rates. As this was not intended, the amendment was wisely omitted.

Our position is that the language limiting the application of Sections 208, 210 and 300 differing in this respect from the language of other sections of the first three titles of the Transportation Act, 1920, is a clear indication that Congress did not intend that these sections should have unlimited application, but that they should apply only to the extent indicated above.

As we have said, the language limiting the application of Sections 210 and 300 is the same as that in

Section 208. So far as we have been able to ascertain, Section 210 has not been construed by the courts. Section 300, however, was considered by this Court in *Pennsylvania Railroad Co. v. United States Railroad Labor Board*, 261 U. S. 72. While the point was not expressly before the Court, there can be no doubt that the Court assumed that Section 300 has application only to disputes arising between carriers in interstate commerce and their employees; in other words, that it has no application to purely intrastate carriers and their employees. The statement of the case, which the report states was made by the Chief Justice, opens as follows (p. 72):

> "This case involves the construction of Title III of the Transportation Act of 1920, c. 91, 41 Stat. 456, 469. The Title provides for the settlement of disputes between railroad companies engaged in interstate commerce and their employees, and as a means of securing this, it creates a Railroad Labor Board and defines its functions and powers."

Later in the statement of the case appears the following sentence (p. 76):

> "Section 301 makes it the duty of carriers, their officers, employees and subordinate officials, to exert every reasonable effort to avoid interruption to the operation of an interstate commerce carrier due to a dispute between the carrier and its employees, and further provides that such disputes shall be considered and if possible decided 'in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute.' "

The opinion of the Court contains the following sentences (p. 79):

> "It is evident from a review of Title III of the Transportation Act of 1920 that Congress

> deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a National Board appointed by the President, upon which are an equal number of representatives of the Carrier Group, the Labor Group, and the Public. . . . The evident thought of Congress in these provisions is that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault."

We think it is clear from the above that this Court is of the opinion that Title III of the Transportation Act applies only to carriers engaged in interstate commerce.

The language which describes the scope of Title III. is identical with the language which describes the scope of Section 208. In both, the carriers affected are limited to those which are "subject to the Interstate Commerce Act." It would seem, therefore, to be incontrovertible that as this Court construes Title III. to relate only to carriers engaged in interstate commerce, the same construction must be applied to Section 208.

In this connection the attention of the Court is respectfully directed to its decision in the case of *State of Texas v. Eastern Texas Railroad Company*, 258 U. S. 204, in which paragraphs 18, 19 and 20 of Section 402 of the Transportation Act were under considera-

tion. Paragraphs 18, 19 and 20, 41 U. S. Stat. at Large, pages 477, 478, relate to the extension or abandonment of lines of railway and require said abandonment *inter alia,* to be subject to the approval of the Interstate Commerce Commission. The language of the section so far as regards the scope thereof is as follows, page 477:

> "No carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

It will be observed that the Act applies to railroads "subject to this Act." This expression, as has already been pointed out, is identical in meaning with the expression used in Section 208 (a) which limits the application of that section to rates "in effect on the lines of carriers subject to the Interstate Commerce Act." It would seem, therefore, as if the scope of the two sections should be the same, especially as they occur in the same enactment.

The facts were that the Eastern Texas Railroad Company, pursuant to authority granted to it by the Interstate Commerce Commission, was proposing to abandon its intrastate railroad. The case involved an effort by the State of Texas to prevent this from being done. It was argued that the Transportation Act, 1920, should not be construed to regulate the construction, acquisition or abandonment of lines exclusively engaged in intrastate commerce. As against this argument it was contended on the part of the company that the said Act did provide for the abandonment of such roads upon the consent of the Interstate Commerce Commission, which had been secured. The road was engaged partly in intrastate commerce and partly

in interstate and foreign commerce. It was conceded that so far as its operations related to interstate and foreign commerce, Congress had the power to give the Interstate Commerce Commission authority over it and had done so. It was contended, however, that in so far as the operations of the road related only to intrastate commerce, Congress had not acted and had no power to act. The Supreme Court used the following language (258 U. S., pp. 217 and 218):

> "If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction their validity will be undoubted. Of such a situation, this court has said, 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.' United States v. Delaware & Hudson Co., 213 U. S. 366, 407-408.
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> "Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act they are to be read in connection with it and with other amendments of it. As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulations of intrastate commerce, save such as is involved in the right-

ful exertion of the power of Congress over interstate and foreign commerce. Minnesota Rate Cases, 230 U. S. 352, 418; Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563. And had there been a purpose here to depart from the accustomed path and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared. This was not done.

"These considerations persuade us that the paragraphs in question should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business."

It is respectfully submitted that the force of the reasoning of the Court in this case compels a similar decision in the case at bar. The language of the section construed is so precisely similar to that under consideration in this case that a different conclusion seems impossible, especially as the two sections of the statute were part of the same enactment and were approved at the same time.

The only distinction which we think can be made between the case cited and the case at bar is that those sections of the Transportation Act which were under consideration in the Texas case purport to affect the operations of the carriers for an indefinite period and if they relate to purely intrastate commerce there was a more serious question as to their constitutionality than there would be in the case at bar if Section 208 (a) were construed to apply to intrastate rates during the guarantee period. We concede that it may be reasonably argued that Congress would have the power to maintain intrastate rates for a limited period in re-

turning the country from a war to a peace basis. We do not concede that Congress would have this power but we do concede that a much more reasonable argument could be made in favor of it than in favor of the permanent power of the Interstate Commerce Commission to control the abandonment of intrastate railroads.

But notwithstanding this possible distinction, we submit that where an expression contained in one section of the Statute has been construed in a certain way, substantially identical language in another section must be construed in the same way unless there is some compelling reason to the contrary, which we do not find in this case.

We, therefore, conclude on this branch of the argument that Section 208 (a) of the Transportation Act, 1920, does not require the consent of the Interstate Commerce Commission to the reduction of an intrastate rate which has no effect upon interstate commerce, and therefore regardless of any other point in the case, the judgment of the Court below was correct and should be affirmed.

IV. Even if the Transportation Act Should be Construed to Apply to the Rates in Question, the Reparation Order Was Not a Reduction of the Rate and Therefore Was Not Subject to the Approval of the Interstate Commerce Commission.

We have already argued that the reparation order was not a reduction of the rate, but was a quasi-judicial decision awarding damages to a shipper. We advanced this argument in connection with our contention that it was the action of the Commission in Case 3206 which reduced the rate, and that plaintiffs-in-error should have taken an appeal from that decision if they desired to further contest the fixing of the rates, either prospective or retroactive.

We now make the same point, but approach it from a different angle. Section 208 (a) of the Transportation Act provides that certain rates shall not be reduced unless such reduction is approved by the Interstate Commerce Commission. We submit that an award of reparation in an action for damages by a shipper is in no case a reduction which the Act makes subject to the approval of the Interstate Commerce Commission.

If Congress had intended to make all quasi-judicial decisions of State Commissions awarding damages for injuries sustained during the guarantee period subject to appeal to the Interstate Commerce Commission, it would have said so in plain language.

What the Act was evidently intended to reach was a decision by a Commission affecting the public; that is an order concerning rates. Certainly it is no such case where all the Commission does is to award damages to a particular shipper. This question is very carefully discussed in *Southern Pacific Company v. Railroad Commission of the State of California,* 194 Cal. 734, 231 Pacific Rept. 28. The Court in a situation similar to that in the case at bar reached the conclusion that it was not the intention of the Transportation Act to make orders for reparation subject to the approval of the Interstate Commerce Commission. This was said in view particularly of the decision of this Court in Baer Bros. v. Denver & Rio Grande R. R. Co., 233 U. S. 479, discussed, *supra.*

In this connection the attention of the Court is directed to the fact that the order of reparation was not made until long after the guarantee period had expired, and prior to that time the Interstate Commerce Commission had held, and we think rightly, that it had no jurisdiction to approve or disapprove orders of reparation made in such cases. (See conference ruling

of the Interstate Commerce Commission, Tr., p. 18.)

In view of the ruling of the Interstate Commerce Commission that it had no jurisdiction to approve or disapprove such orders of reparation, shippers who had suffered damage by reason of unlawful charges which had been collected during the guarantee period would be without redress if plaintiffs-in-error are correct in holding that such awards cannot be enforced without the approval of the Interstate Commerce Commission. This view seems to us to be unreasonable.

The view of the Supreme Court of Pennsylvania as to the legal effect of what was done by the State Commission is in another particular well worthy of consideration. After pointing out that the rate complained against was unlawful because it had been illegally constructed under General Order 28, upon a base rate which had been condemned as illegal, the State Supreme Court says (281 Pa. 269):

> "The State Commission made no attempt to reduce any rates, but to correct a charge based on an admittedly illegal premise, and make it conform to one determined as reasonable prior to federal control."

This view of the matter seems to us to be sound. It is not to be supposed that Congress intended that rates which had been unlawfully constructed, and in fact fraudulently constructed, as this one was, should be continued without power in some proper authority to correct the illegality and to enforce the proper rate. Correction of a wrong done in this manner cannot under any theory of the case be deemed to be a reduction of a rate.

It was, therefore, not subject to the approval of the Interstate Commerce Commission.

We submit that the decision of the Court below on the merits was correct, and if this Court should assume jurisdiction of the case that the judgment should be affirmed.

Respectfully,

T. R. WHITE,
For Defendant-in-Error.